No. _____

In The
Supreme Court of the United States

RICHARD LEAKE and MICHAEL DEAN,

Petitioners,

v.

JAMES T. DRINKARD, In his personal capacity and official capacity as Assistant City Administrator of the City of Alpharetta, Georgia; JIM GLIVIN, In his personal capacity and official capacity as Mayor of the City of Alpharetta; DONALD F. MITCHELL, In his personal capacity and official capacity as Mayor Pro Tem of the City of Alpharetta; JASON BINDER, In his personal capacity and official capacity as a member of the City Council of the City of Alpharetta; BEN BURNETT, In his personal capacity and official capacity as a member of the City Council of the City of Alpharetta; JOHN HIPES, In his personal capacity and official capacity as a member of the City Council of the City of Alpharetta; DAN MERKEL, In his personal capacity and official capacity as a member of the City Council of the City of Alpharetta; KAREN RICHARD, In her personal capacity and official capacity as a member of the City Council of the City of Alpharetta; and THE CITY OF ALPHARETTA, GEORGIA, a municipal corporation,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the District Court and Eleventh Circuit Court of Appeals erred when applying the "Government Speech" doctrine to limit the speech of private citizens and organizations participating in government sponsored parades on the basis of flags which such participants wish to display in an objective historical context, which occur on public streets and are open to all participants that have submitted proper applications, in violation of the First Amendment to the United States Constitution.

2. Whether the District Court and Eleventh Circuit Court of Appeals impermissibly expanded the "Government Speech" doctrine to limit the use of historic flags upon which the local government has imposed a particular meaning, and which can be used to ban any symbol the government wishes to restrict thereafter in violation of the First Amendment to the United States Constitution.

LIST OF PARTIES TO THE PROCEEDINGS IN THE COURT BELOW

The caption of the case in this court contains the names of all of the parties to the proceedings in the United States Court of Appeals for the Eleventh Circuit.

STATEMENT OF RELATED CASES

1. *Richard Leake, et al. v. James T. Drinkard, et al.*; United States District Court for the Northern District of Georgia (1:19-cv-03463-WMR); judgment granting Defendants' motion for summary judgment entered on June 26, 2020.

2. *Richard Leake, et al. v. James T. Drinkard, et al.*; United States Court of Appeals for the Eleventh Circuit (20-13868); judgment affirming the judgment of the district court entered on September 28, 2021.

There are no other related cases.

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PETITION FOR A WRIT OF CERTIORARI

Richard Leake and Michael Dean, Petitioners in this action, respectfully request that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eleventh Circuit entered in this case on September 28, 2021.

OPINIONS BELOW

The September 28, 2021, opinion of the United States Court of Appeals for the Eleventh Circuit, whose judgment is sought to be reviewed, is reported at 14 F.4th 1242 (11th Cir. 2021) and is reprinted in the separate Appendix to this Petition.

The prior opinion of the United States District Court for the Northern District of Georgia, entered June 6, 2020, is unreported, and is reprinted in the separate Appendix to this Petition.

STATEMENT OF JURISDICTION

The judgment of the court of appeals was entered on September 28, 2021. The jurisdiction of this court is invoked pursuant to 28 U.S.C.A. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the First Amendment to the Constitution of the United States which provides as follows:

> Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

This case also involves Section 1 of the Fourteenth Amendment to the Constitution of the United States which provides as follows:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Shortly after the end of the Civil War,[1] an event known as The Old Soldiers Day Parade began to be held on an annual basis in Alpharetta, Georgia, to honor Confederate veterans of that war, but the parade was discontinued circa 1928.[2] The City of Alpharetta resumed the Parade in 1952 after a group of citizens made it known that they wanted to recognize local war veterans. Every year since 1952, the City of Alpharetta has sponsored the event which is staged on the public streets of the municipality.

The 67th Annual Old Soldiers Day Parade was held on August 3, 2019. On its website, the City described the parade "as a way to celebrate and honor all war veterans, especially those from Alpharetta, who have defended the rights and freedoms enjoyed by everyone in the United States of America." According to the City's announcement, "The goal of this parade is to celebrate American war veterans and recognize their service to our country." The City's advertisement identified the "City of Alpharetta and American Legion Post 201" as being "hosts [of] the Annual Old Soldiers Day Parade." Although the Legion was involved, the City was the Parade's primary financial sponsor, and it

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[1] While there are a number of names used to identify the conflict of 1861 through 1865, including the War of the Rebellion and the War Between the States, Petitioners will be referring to it as the Civil War throughout this petition.

[2] It was shortly after the end of the First World War that the surviving Confederate Veterans opened the parade to the Nation's newest veterans, those of the Great War.

was responsible for all of its costs (approximately $28,400).

Any private organization which wanted to participate in the event was required to apply to the City. The application itself identified the theme of the Parade: "The American Legion—A Century of Service." The application form included logos of both the Legion and the City, along with other information. Applicants were instructed to mail or fax the application to the "Parade Marshal" at "American Legion Post 201 c/o City of Alpharetta Special Events," and it listed government mailing and email addresses. The final decision about whether to permit an entity's participation in the Parade was made by the City.

Plaintiff Richard Leake completed an application on behalf of the Roswell Mills Camp Sons of Confederate Veterans, of which he was a member. The application asked for a detailed description of the Sons of Confederate Veterans' float. Plaintiff described the entry as being a "[t]ruck pulling trailer with participants holding unit flags." The application also asked applicants to "write a description of what you would like to say about your group or organization as you pass the Reviewing Stand." Plaintiff wrote that the group would say that the Sons of Confederate Veterans is an "organization dedicated to preserving the memory of our ancestors who served in the War Between the States and ensuring that the Southern view of that conflict is preserved." The application required that applicants agree to "abide by all rules and regulations set forth by

the event organizers in the Old Soldiers Day Parade." Plaintiff signed the application without qualification.

The next day, James Drinkard, the Assistant City Administrator, sent a letter to Plaintiff in response to his application "following approval from Mayor Gilvin." In the letter, Drinkard reiterated that the purpose of the Parade is to "unite our community" to "celebrat[e] American war veterans," and that, in the light of that purpose, "there is cause to question the appropriateness of participation by an organization devoted exclusively to commemorating and honoring Confederate soldiers." Drinkard's letter went on to state "that the Confederate Battle Flag has become a divisive symbol that a large portion of our citizens see as symbolizing oppression and slavery." In the City's view, this was "unacceptable." The letter concluded that the City would adhere to its decision, as supported by the Mayor and the City Council, to not allow the Confederate Battle Flag to be displayed in the Old Soldiers Day Parade. As an alternative, the City offered to allow the Sons of Confederate Veterans to participate in the Parade "absent the Confederate Battle Flag." The Sons of Confederate Veterans would be required to agree not to do anything "that would detract from the event goal of uniting our community for the purpose of celebrating American war veterans." Drinkard informed Plaintiff that "the City of Alpharetta [would] approve [his] application" if he were to agree to these conditions.

Three days before the Parade, Plaintiffs filed suit against Leake and other City officials, including the Mayor, in order to invoke their right to free speech

under the First and Fourteenth Amendments. Plaintiffs sought monetary damages for the violation of their rights, as well as equitable relief in the form of a temporary restraining order, a preliminary injunction, and a permanent injunction, so that they could participate with the Confederate Battle Flag in the upcoming Parade and in future parades. On the day before the Parade, the district court reserved ruling on the motion for a temporary restraining order and declined to issue an injunction. The Parade went ahead as planned, without the participation of the Sons of Confederate Veterans, whose sympathizers instead flew the Confederate Battle Flag along the side of the Parade route rather than be subjected to viewpoint censorship.

After the Mayor and City Council formally resolved "that the City of Alpharetta shall no longer sponsor or financially support future Old Soldiers Day Parades," the City moved for summary judgment. The district court later granted summary judgment for the City on the ground that the Parade constituted government speech.

Plaintiffs appealed, and a panel of the United States Court of Appeals for the Eleventh Circuit affirmed the decision of the district court.

REASONS FOR GRANTING THE WRIT

The present case is not one in which Petitioners seek the court to grant its writ of certiorari for the purpose of advancing a novel theory of constitutional interpretation; nor is it one in which Petitioners advance arguments in support of repudiating established constitutional jurisprudence. Instead, Petitioners seek a writ of certiorari in order to afford the court the opportunity of clarifying the meaning and the parameters of the public forum doctrine, as well as distinguishing it from the articulation and application of the maxim that when a government chooses to speak that it is the sole arbiter of the content and message of such speech.

ARGUMENT

1. The District Court and Eleventh Circuit Court of Appeals erred when applying the "Government Speech" doctrine to limit the speech of private citizens and organizations participating in government sponsored parades on the basis of flags which such participants wish to display in an objective historical context, which occur on public streets and are open to all participants that have submitted proper applications, in violation of the First Amendment to the United States Constitution.

A. The District Court and the Circuit Court of Appeals failed to take into account the factors enunciated in *Walker v. Texas Division, Sons of Confederate Veterans, Inc.* for determining whether actions of the City of Alpharetta constituted government speech, and such failure caused those courts to ignore *in toto* the constitutional doctrine which provides blanket protection for the speech which Petitioners sought to communicate.

The First Amendment provides in relevant part that "Congress shall make no law . . . abridging the freedom of speech." U.S. Const. amend. I. This personal right which is embodied in the fabric of American citizenship is protected against State abridgment by the Fourteenth Amendment. *Gitlow v. New York*, 268 U.S. 652, 666 (1925).

The First Amendment works as a shield to protect private persons from "encroachment[s] by the government" on their right to speak freely, *Hurley v. Irish—Am. Gay, Lesbian & Bisexual Grp. of Bos., Inc.*, 515 U.S. 557, 566 (1995), not as a sword to compel the government to speak for them. "[T]he Free Speech Clause of the First Amendment restricts government regulation of private speech; it does not regulate government speech." *Pleasant Grove City v. Summum*, 555 U.S. 460, 467 (2009). "[A] government entity has the right to speak for itself," which consists generally in the ability "to say what it wishes" and "to select the views that it wants to express." *Id.* at 467–468. This prerogative on the part of government entities includes "choosing not to speak" and "speaking through the . . . removal" of speech that the government disapproves. *Ark. Educ. Television Comm'n v. Forbes*, 523 U.S. 666, 674 (1998).

"[I]n the realm of private speech or expression, government regulation may not favor one speaker over another." *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 828 (1995). Because characterizing speech as government speech "strips it of all First Amendment protection" under the Free Speech Clause, *Walker v. Texas Division, Sons of Confederate Veterans, Inc.*, 576 U.S. 200, 220 (2015) (Alito, J., dissenting), a court should tread lightly in applying the government speech label to an action undertaken by the government.

This court has not articulated a precise test for separating government speech from private speech, but its recent decision in *Walker* concluded that the

specialty license plates for motor vehicles in Texas constituted government speech is illustrative of the manner in which the issue should be analyzed.

The analysis of the Eleventh Circuit in interpreting *Walker* to bring this case within the purview of government speech must fail because the panel utterly failed to consider the factors enunciated in *Walker* and such failure caused that court to ignore *in toto* the constitutional doctrine which provides blanket protection for the speech which Petitioners sought to articulate. The present case is not about government speech; instead, it is a case which requires application and understanding of the public forum doctrine.

In *Walker*, the Supreme Court considered a free speech claim brought by the Texas Division of the Sons of Confederate Veterans, challenging Texas' decision to reject SCV's request for the state to issue a specialty license plate displaying the organization's name and a depiction of a confederate flag. *Walker*, 576 U.S. at 203–204. *Walker* is authoritative on the facts presented in that case, but it does not control the outcome of the present case because of significant factual and legal distinctions.

The Texas State Motor Vehicles Board may "create new specialty license plates on its own initiative or on receipt of an application from a" nonprofit entity seeking to sponsor a specialty plate. Tex. Transp. Code Ann. §§ 504.801(a), (b). A nonprofit must include in its application "a draft design of the specialty license plate." 43 Tex. Admin. Code § 217.45(i)(2)(C). The relevant

statute says that the Board "may refuse to create a new specialty license plate" for a number of reasons; for example, "if the design might be offensive to any member of the public . . . or for any other reason established by rule." Tex. Transp. Code Ann. § 504.801(c). The Texas statutory scheme specifically provides that final authority over the design and content of specialty license plates, other than those specifically authorized by the Texas legislature, rests with the Board.

In upholding the right of the State of Texas to control the content of messages articulated on its license plates, this court identified three distinct factors in order to determine if Texas had engaged in government speech.

First, "the history of license plates" suggests "they long have communicated messages from the States" in order to urge action, to promote tourism, to tout local industries, and to commemorate historically noteworthy events. *Walker*, 576 U.S. at 211–212. Such messages have been conveyed by graphics and slogans since the early twentieth century, and Texas approved specialty license plates "for decades." *Id.* Second, reasonable observers would conclude that Texas "agree[s] with the message displayed" on specialty license plates due to their purpose and design. *Id.* at 212–213. Each Texas license plate is a government article serving the governmental purposes of vehicle registration and identification. The governmental nature of the plates is clear from their faces by the placement of the name "TEXAS" in large letters at the top of every plate. Texas issues the plates, regulates their disposal, and

owns the designs displayed thereupon. Moreover, the State requires Texas vehicle owners to display license plates on every motor vehicle operated upon the public highways of the state. The license plates constitute a governmental issued and required means of identification. As a practical matter, the issuers of means of identification control all aspects of their display, appearance, and any messages communicated by them other than to identify the bearer thereof. *Summum*, 555 U.S. at 471. "Persons who observe" designs on IDs "routinely—and reasonably—interpret them as conveying some message on the [issuer's] behalf." *Walker*, 576 U.S. at 212.

Third, Texas exercised "direct control over the messages" on specialty license plates. *Id.* Under the governing regulations, the Texas Department of Motor Vehicles Board "must approve every specialty plate design proposal," and Texas dictates "the design, typeface, color, and alphanumeric pattern for all license plates," *Id.* (quoting 43 Tex. Admin. Code § 504.005(a)). This final approval authority allows Texas to reserve to itself the decisions of how to present itself and its constituency.

These three factors taken together established that the specialty license plates were government speech. The three-pronged analysis employed in *Walker* provides a guide for courts to determine if a specific government action constitutes government speech; however, it does not mandate an inflexible rule of constitutional doctrine that any governmental

participation in an action necessarily implicates the government speech doctrine.

The decision of the Eleventh Circuit in the present case is fatally flawed because the grounding of the three-pronged test of *Walker*, as well as the specific context of the *Walker* decision, was ignored in favor of a fallacious attempt to cast this proceeding as one which implicates the government speech doctrine.

First, the history of the Alpharetta parade tends to establish that it was never intended or understood as communicating a specific message from the city. The parade has its origins in the period of time after the end of the Civil War when an event known as The Old Soldiers Day Parade began to be held on an annual basis in Alpharetta to honor Confederate Civil War veterans before being discontinued around 1928. Prior to being discontinued, the surviving Confederate Veterans opened the parade to veterans of the First World War. The event resumed in 1952 after a group of citizens made it known that they wanted to recognize local war veterans, and it has been an annual event conducted on the public streets of the municipality for the purpose of extending such recognition.[3] ***The parade***

[3] Under Federal law, the term "veteran" is defined to include persons who "served for ninety days or more in the active military or navel service during the Civil War." *See* 38 U.S.C. § 1532 (2018). The Congress of the United States also defines and grants the status and benefits of being an American "veteran" to any person "who served in the military or naval forces of the Confederate States of America during the Civil War[.]" 38 U.S.C. § 1501 (2018).

originated and resumed as a direct result of actions and decisions undertaken by the citizens of Alpharetta, not as a consequence of a decision made by the municipal government. While the record establishes that the city publicly expressed the sentiment that "all war veterans, especially those from Alpharetta" should be "celebrate[d] and honor[ed]," that endorsement by itself does not make the parade an example of government speech, particularly given the fact that the local American Legion post was recognized as a partner with the city in sponsoring the event.

Second, there is no basis for concluding that an observer of the parade would understand that the city approved any message being conveyed by the participants. There is nothing in the record tending to show that an approved participant in the event was required to convey any message on behalf of the municipality. By allowing an individual or group to participate in the event, the city did not necessarily endorse the specific meaning or intention by such participation. *Summum*,

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The Congress of the United States also instructed: "That the Secretary of the Army is authorized and directed to furnish, when requested, appropriate Government headstones or markers at the expense of the United States for the unmarked graves of the following[.]" The first category listed is "Soldiers of the Union and Confederate Armies of the Civil War." 24 U.S.C. § 279(a) (repealed 1 September 1973). Pensions were also authorized for surviving Confederate veterans and their widows.

Moreover, in a letter dated January 17, 2019, from the American Legion Post, the city was specifically reminded that the Sons of Confederate Veterans had participated in the parade since it resumed in 1952. (R. p. 83)

555 U.S. at 476–477. The record tends to establish that participants were free to portray themselves and communicate in the manner which they chose. The sole exception was that which was applied to Petitioners because of the conclusion that Petitioners' participation in the event would be offensive to one or more individuals and groups.[4]

Third, other than choosing to exclude Petitioners from the parade, the record does not tend to show that the city retained direct control over the messages conveyed in the parade. If an individual or group received permission to participate in the event, they were not subject to control by the city as to the message or portrayal which they offered to spectators. Of course, the municipality took actions on behalf of public safety by securing the parade route and by maintaining a law enforcement presence throughout the event. In doing so, the municipality was merely exercising its police power for the benefit of spectators and participants. Such activity had nothing to do with conveying any message.

Having established that the lower courts failed to interpret and apply *Walker* in light of its factual context and the factors articulated in the majority opinion, Petitioners submit that the government speech

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[4] In *American Legion Post 7 of Durham, N.C. v. Durham*, 239 F.3d 601, 606 (4th Cir. 2001), the Fourth Circuit noted that "[f]lags, especially flags of a political sort, enjoy an honored position in the First Amendment hierarchy" because they are "close[] to the core of political expression protected by the First Amendment."

doctrine cannot be employed to bar Petitioners from participating in the annual parade.

B. The streets of Alpharetta, Georgia constitute a public forum, and a parade conducted upon such streets is a protected exercise of freedom of speech guaranteed by the First Amendment; and the city cannot discriminate among speakers based upon the content of their expression.

It is axiomatic that the government may not regulate speech based on its substantive content or the message it conveys. *Police Dept. of Chicago v. Mosley*, 408 U.S. 92, 96 (1972). In the realm of private speech or expression, government regulation may not favor one speaker over another. *Members of City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 804 (1984). Discrimination against speech because of the content of its message is presumed to be unconstitutional. *See Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 641–643 (1994). These rules have historically informed the court's determination that government offends the First Amendment when it imposes burdens on certain speakers based on the content of their expression. *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 115 (1991). When the government targets not subject matter, but particular views taken by speakers on a subject, the violation of the First Amendment is all the more blatant. *See R.A.V. v. St. Paul*, 505 U.S. 377, 391 (1992).

The government must abstain from regulating speech when the specific motivating ideology, the opinion, or perspective of the speaker is the rationale for the restriction. *See Perry Ed. Assn. v. Perry Local Educators' Assn.*, 460 U.S. 37, 46 (1983).

When the government excludes from its own property private speech protected by the First Amendment, this Court's precedents require a forum analysis for assessing the constitutionality of the speech restriction. *Minn. Voters All. v. Mansky*, 138 S. Ct. 1876, 1885 (2018). "The forum doctrine has been applied in situations in which government-owned property or a government program was capable of accommodating a large number of public speakers without defeating the essential function of the land or the program." *Summum*, 555 U.S. at 478. This court historically has used the forum analysis "as a means of determining when the Government's interest in limiting the use of its property to its intended purpose outweighs the interest of those wishing to use the property for other purposes." *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 800–801 (1985). Under the forum doctrine, a court "must identify the nature of the forum, because the extent to which the Government may limit access depends on whether the forum is public or nonpublic." *Cornelius*, 473 U.S. at 797. Then the court "must assess whether the justifications for exclusion from the relevant forum satisfy the requisite standard." *Id.*

Streets and parks have been recognized as "quintessential public forums" that had "'immemorially

been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions.'" *Perry*, 460 U.S. 45. The same protection has been extended to sidewalks. *United States v. Grace*, 461 U.S. 171, 179 (1983) ("Sidewalks, of course, are among those areas of public property that traditionally have been held open to the public for expressive activities and are clearly within those areas of public property that may be considered, generally without further inquiry, to be public forum property.").

The core concept underlying public forum principles is that government may not engage in viewpoint discrimination among private speakers exercising their free speech rights in a public forum. "It is uncontested and uncontestable that government officials may not exclude from public places persons engaged in peaceful expressive activity solely because the government actor fears, dislikes, or disagrees with the views those persons express." *Wood v. Moss*, 572 U.S. 744 (2014) (*citing Mosley*, 408 U.S. at 756–757). The core concept underlying government speech doctrine is exactly the opposite: government may engage in viewpoint discrimination in choosing what positions to favor or not favor in the exercise of its own speech. 1 Smolla & Nimmer on Freedom of Speech § 8:1.50 (2021). When a private speaker's message is enlisted by the government to support the government's position, there can be no First Amendment objection; on the other hand, when the government is

discriminating on the basis of viewpoint among private speakers, there is a virtually automatic violation of First Amendment doctrine. The distinction was illustrated in *Pleasant Grove City v. Summum*, *supra* in which this court held that a decision by a city to accept certain private monuments in city park and not accept others was an exercise in government speech, and thereby immune from First Amendment attack, rather than an exercise in viewpoint discrimination among private speakers. Justice Alito observed:

> There may be situations in which it is difficult to tell whether a government entity is speaking on its own behalf or is providing a forum for private speech, but this case does not present such a situation. . . . Permanent monuments displayed on public property typically represent government speech.

Summum, 555 U.S. at 470.

Courts must be vigilant in not permitting overly expansive interpretations of the government speech doctrine to overwhelm the fundamental First Amendment principles forbidding viewpoint discrimination in public forums. *See Gerlich v. Leath*, 861 F.3d 697 (8th Cir. 2017) (A state university's regime for granting trademark licensure for student organizations was in a limited public forum, and not an exercise in government speech.). Construing the government's decision to allow or facilitate access to public property as engaging in government speech would turn First Amendment doctrine upside down. Smolla & Nimmer on Freedom of Speech, *supra.* The private speech of

citizens does not become the public speech of the government merely because the government provides the forum in which the private speech is expressed. *Cornelius*, 473 U.S.at 811–813 (a charity drive organized by government was nonpublic forum for private speakers to solicit donations, and therefore that viewpoint discrimination was prohibited); *Latino Officers Ass'n, N.Y., Inc. v. City of N.Y.*, 196 F.3d 458, 468–469 (2d Cir. 1999) (holding that a police department's refusal to permit police affinity group to march in parades was not a form of government speech); *compare Wandering Dago, Inc. v. Destito*, 879 F.3d 20, 35 (2d Cir. 2018) ("The record contains no basis for thinking that Lunch Program vendors' names, any more than the names of other organizations that receive permits to use public lands for special events, are closely identified with the government "in the public mind.").

The record shows the city's acceptance of all applications to participate in the parade *except* that of Petitioners. The city's restriction of Petitioners' speech was content based because they intended to display the Confederate Battle Flag and regimental standards of Georgia Confederate units while individuals wore uniforms replicating those used in the conflict. "Content-based laws—those that target speech on its communicative content—are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling government interests." *Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015). Strict scrutiny is "the most demanding test known to constitutional law," *City of Boerne v. Flores*,

521 U.S. 507, 534 (1997), which government restrictions rarely survive. *See Burson v. Freeman*, 504 U.S. 191, 200 (1992).

Regulation of the subject matter of messages is an objectionable form of content-based regulation. *Hill v. Colorado*, 530 U.S. 703, 721 (2000). Petitioners' application was denied solely because of the intention of Petitioners to recognize and commemorate Confederate veterans. This denial amounts to a content-based restriction on speech that is presumptively unconstitutional and subject to strict scrutiny. *See Reed*, 576 U.S. at 163. It is the city's burden to prove narrow tailoring under strict scrutiny. *McCullen v. Coakley*, 573 U.S. 464, 495 (2014). However, the city has never argued its censorship of Petitioners' message by denial of their application was narrowly tailored. Instead, the city relied solely on its contention that the government speech doctrine insulated it from having its decision challenged.

It is not enough to show that the government's ends are compelling; the means must be carefully tailored to achieve those ends. *Sable Commc'ns of Cal., Inc. v. FCC*, 492 U.S. 115, 126 (1989). "Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity." *NAACP v. Button*, 371 U.S. 415, 433 (1963). Total prohibitions on constitutionally protected speech are substantially broader than any conceivable government interest could justify. *Bd. of Airport Comm'rs of City of LA. v. Jews for Jesus, Inc.*, 482 U.S. 569, 574 (1987).

The city's standard-less policies and practices are unconstitutional prior restraints which vest unbridled discretion in a city official to determine whether speech can be excluded despite meeting all criteria for use of the public forum utilized for the parade. "Any system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity." *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963). "[I]n the area of free expression a licensing statute placing unbridled discretion in the hands of a government official, or agency constitutes a prior restraint." *City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 757 (1988). And "a law subjecting the exercise of First Amendment freedoms to the prior restraint of a license must contain narrow, objective, and definite standards to guide the licensing authority." *Forsyth Cnty. v. Nationalist Movement*, 505 U.S. 123, 131 (1992).[5]

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[5] The record establishes that, while the Confederate Battle Flag and Georgia regimental flags incorporating the same were banned. The city permitted the display of the Bonnie Blue Flag, the First National Flag, and Georgia Militia Flags. Historically, the Bonnie Blue Flag is a dark blue banner with a white star in its center, being used as an unofficial flag of the Confederacy during the early months of the war. This same flag was flying above the Confederate batteries that opened fire on Fort Sumter. See Coski, The Confederate Battle Flag: America's Most Embattled Emblem (Harvard University Press 2005). In light of this history, one could argue that any flags associated with the Confederacy might be as offensive to some individuals as the Confederate Battle Flag. Yet, the Bonnie Blue Flag and other flags were permitted to be displayed in the parade. This fact alone tends to establish unbridled and unconstitutional content-based discrimination by the City in relation to the Petitioners. One must ask if the city

In *Hurley v. Irish–American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557 (1995), Justice Souter observed:

> If there were no reason for a group of people to march from here to there except to reach a destination, they could make the trip without expressing any message beyond the fact of the march itself. Some people might call such a procession a parade, but it would not be much of one. Real "[p]arades are public dramas of social relations, and in them performers define who can be a social actor and what subjects and ideas are available for communication and consideration." . . . Hence, we use the word "parade" to indicate marchers who are making some sort of collective point, not just to each other but to bystanders along the way. Indeed, a parade's dependence on watchers is so extreme that nowadays, as with Bishop Berkeley's celebrated tree, "if a parade or demonstration receives no media coverage, it may as well not have happened." . . . Parades are thus a form of expression, not just motion, and the inherent expressiveness of marching to make a point explains our cases involving protest marches. In *Gregory v. Chicago*, 394 U.S. 111, 112 (1969), for example, petitioners had taken part in a procession to express their grievances to the city government, and we held that such a "march, if peaceful and orderly, falls well within the

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would have banned the Georgia state flag as it existed prior to 2001 with the Confederate Battle Flag occupying most of its space.

> sphere of conduct protected by the First Amendment." Similarly, in *Edwards v. South Carolina*, [372 U.S., 229, 235], where petitioners had joined in a march of protest and pride, carrying placards and singing The Star Spangled Banner, we held that the activities "reflect an exercise of these basic constitutional rights in their most pristine and classic form." *Accord, Shuttlesworth v. Birmingham*, 394 U.S. 147, 152 (1969).

Hurley, 515 U.S. at 568–569.

The protected expression that inheres in a parade is not limited to its banners and songs because the Constitution looks beyond written or spoken words as mediums of expression. Symbolism is a primitive but effective way of communicating ideas. *West Virginia Bd. of Ed. v. Barnette*, 319 U.S. 624, 632 (1943). The First Amendment shields such acts as saluting a flag (and refusing to do so), *Id.* at 632, 642, wearing an armband to protest a war, *Tinker v. Des Moines Independent Community School Dist.*, 393 U.S. 503, 505–506 (1969), displaying a red flag, *Stromberg v. California*, 283 U.S. 359, 369 (1931), and even "[m]arching, walking or parading" in uniforms displaying the swastika, *National Socialist Party of America v. Skokie*, 432 U.S. 43 (1977).

In light of the foregoing, Petitioners submit that they were unconstitutionally excluded from participating in the parade solely because of the content of their intended message and the manner in which they

intended to convey it in their efforts to honor and preserve the memory of Confederate Civil War Veterans.

2. The District Court and Eleventh Circuit Court of Appeals impermissibly expanded the "Government Speech" doctrine to limit the use of historic flags upon which the local government has imposed a specific meaning, and which can be used to ban any symbol the government wishes to restrict thereafter in violation of the First Amendment to the United States Constitution.

The city's government speech argument fails under this Court's precedents. Parades upon the public streets of a municipality, which are open to all who submit a perfunctory application for permission to participate, do not implicate the government speech doctrine. The fact that the city, in tandem with a local veteran's group, initiated and administered the application process and contributed a sum to help cover the cost of the event, does not make the parade a communication that is protected as government speech. The record tends to show that none of the three factors deemed important for determining whether an expression by a government constitutes government speech doctrine under *Walker* finds significant support on this record. The brief display of the Confederate Battle Flag, as well as the standards of various Confederate military units, by private individuals participating in a parade being conducted on a municipal street, does not become an expression of government speech any

more than does the display of political signs on public property outside public buildings on election day constitute an endorsement by the government of a particular candidate or viewpoint. The Eleventh Circuit has taken the government speech doctrine as enunciated in *Summum* and *Walker*, and it has made it a rigid and formulaic rule which definitionally hobbles and does severe damage to this Court's public forum doctrine.

Speech, in whatever manner it is conveyed, cannot be constitutionally restricted simply because it is offensive or hurtful to individuals or groups. *Papish v. Bd. Curators of University of Missouri*, 410 U.S. 667 (1973) (per curiam).

Papish was expelled for distributing a newspaper "containing forms of indecent speech" in violation of a bylaw of the Board of Curators. The newspaper had been sold on campus for more than four years pursuant to an authorization obtained from the University Business Office. On the front cover, the publishers had reproduced a political cartoon previously printed in another newspaper depicting policemen raping the Statue of Liberty and the Goddess of Justice. The caption under the cartoon read: " . . . With Liberty and Justice for All." The issue also contained an article entitled "M——-f——- Acquitted," discussing the acquittal of a New York City youth charged with assault who was a member of an organization known as "Up Against the Wall, M——-f——-."

Papish was expelled because she was found to have violated a provision in a rule of student conduct

which specifically "indecent conduct or speech." After exhausting her administrative review alternatives, Papish brought an action for declaratory and injunctive relief, but relief was denied by the district court and the Eighth Circuit Court of Appeals.

In reversing the circuit court, this court stated:

> . . . the mere dissemination of ideas—no matter how offensive to good taste—on a state university campus may not be shut off in the name alone of 'conventions of decency.' Other recent precedents of this Court make it equally clear that neither the political cartoon nor the headline story involved in this case can be labeled as constitutionally obscene or otherwise unprotected.

410 U.S. at 669–670.

Petitioners do not deny that the Confederate Battle Flag, as well as other symbols arising from the devastation of the Civil War, could be found offensive by some members of American society. To say otherwise would be to deny the ongoing controversy over the causes, meanings, and outcomes of that conflict. Such questions are matters of intense academic and political debate. This court has made it clear that "the public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers." *Street v. New York*, 394 U.S. 576, 592 (1969); *see also Texas v. Johnson*, 491 U.S. 397, 414 (1989) ("If there is a bedrock principle underlying the First Amendment, it is that the government may not

prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable."); *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 55–56 (1988); *Bachellar v. Maryland*, 397 U.S. 564, 567 (1970); *Tinker v. Des Moines Independent Community School Dist.*, 393 U.S. at 509–514.

From the time of its ratification in 1791 to the present, the First Amendment has "permitted restrictions upon the content of speech in a few limited circumstances," and has never "include[d] a freedom to disregard these traditional limitations." *R.A.V.*, 505 U.S. at 382–383. These categories include obscenity, *Roth v. United States*, 354 U.S. 476 (1957), defamation, *Beauharnais v. Illinois*, 343 U.S. 250, 254–255 (1952), fraud, *Virginia Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 771 (1976), incitement, *Brandenburg v. Ohio*, 395 U.S. 444, 447–449 (1969) (per curiam), and speech integral to criminal conduct, *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 498 (1949). These exceptions are "well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem." *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571–572 (1942).

Chief Justice Roberts observed in *United States v. Stevens*, 559 U.S. 460, 470 (2010):

> The Government contends that "historical evidence" about the reach of the First Amendment is not "a necessary prerequisite for regulation today," . . . . The Government thus proposes that a claim of categorical

> exclusion should be considered under a simple balancing test: "Whether a given category of speech enjoys First Amendment protection depends upon a categorical balancing of the value of the speech against its societal costs."
>
> *As a free-floating test for First Amendment coverage, that sentence is startling and dangerous. The First Amendment's guarantee of free speech does not extend only to categories of speech that survive an ad hoc balancing of relative social costs and benefits. The First Amendment itself reflects a judgment by the American people that the benefits of its restrictions on the Government outweigh the costs. Our Constitution forecloses any attempt to revise that judgment simply on the basis that some speech is not worth it. The Constitution is not a document "prescribing limits and declaring that those limits may be passed at pleasure."*

559 U.S. at 469–470 (emphasis added).

Freedom of speech is imperiled if the government can impose its will upon private speech which falls outside of the limited types of expression which historically have fallen outside of the ambit of First Amendment protection by establishing a scheme limiting access to a public forum which fails to satisfy a compelling governmental interest. The forum doctrine has been applied in situations in which government-owned property or a government program was capable of accommodating a large number of public speakers without defeating the essential function of the land or

the program. For example, a park can accommodate many speakers and, over time, many parades and demonstrations. The streets and sidewalks of a municipality can be managed in such a way that they can serve to channel traffic as well as provide an opportunity to express viewpoints which are clothed in protections afforded by the First Amendment.

In *Summum*, the question was whether "the First Amendment entitled a private group to insist that a municipality permit it to place a permanent monument in a city park." 555 U.S. at 464. This Court rejected such a First Amendment claim because "the placement of a permanent monument in a public park is best viewed as a form of government speech." *Id.* This was so because "[i]t is certainly not common for property owners to open up their property for the installation of permanent monuments that convey a message with which they do not wish to be associated." *Id.* at 471.

The record herein shows where a display of the Confederate Battle Flag and other flags in the Veterans' Parade fit within *Summum's* illustrations: the parade was "capable of accommodating a large number of public speakers without defeating the essential function of the [parade]," because it has done so frequently and continually for all applicants for more than one hundred years. The temporary nature of the parade itself ensures that the streets and sidewalks are otherwise available for their principal purposes. In *Walker*, the Court confirmed the importance of the permanence of the monuments at issue in *Summum*: "we

emphasized that monuments were 'permanent,' and we observed that public parks can accommodate only a limited number of permanent monuments." *Walker*, 576 U.S. at 213–214.

Just as this Court has held that the mere involvement of private parties in selecting a government message does not, in and of itself, make the message private expression, *Walker*, 576 U.S. at 210, 217, the mere involvement of the government in providing a forum likewise does not constitute sufficient control to make the message government speech. *See Matal v. Tam*, 137 S. Ct. 1744, 1758 (2017). Access to many public forums requires an application or some form of permission from the government, but an application requirement by itself cannot transform private speech in a public forum into government speech.

Alpharetta's rationale vastly expands and sanctions dangerous aspects of the government-speech doctrine: "[W]hile the government-speech doctrine is important—indeed, essential—it is a doctrine that is susceptible to dangerous misuse. If private speech could be passed off as government speech by simply affixing a government seal of approval, government could silence or muffle the expression of disfavored viewpoints." *Matal*, 137 S. Ct. at 1758; *cf. Walker*, 576 U.S. at 221 (Alito, J., dissenting) ("The Court's decision passes off private speech as government speech and, in doing so, establishes a precedent that threatens private speech that government finds displeasing."). The government cannot, merely by reserving to itself "approval" rights, convert to government speech the

private speech it openly solicits and allows in its designated forums. Any claim by the city of direct or effective control over messages in the parade is a contrivance contradicted by the undisputed evidence of the city's actual practice.

In *Matal*, the lead singer of the rock group "The Slants," sought federal registration of the mark "THE SLANTS." The Patent and Trademark Office (PTO) denied the application under a Lanham Act provision prohibiting the registration of trademarks that may "disparage . . . or bring . . . into contemp[t] or disrepute" any "persons, living or dead." 15 U.S.C. § 1052(a). After the administrative appeals process was exhausted, the case was heard in the Federal Circuit which found the disparagement clause facially unconstitutional.

When deciding whether a trademark is disparaging, an examiner at the Patent and Trademark Office generally applies a "two-part test." The examiner first considers "the likely meaning of the matter in question, taking into account not only dictionary definitions, but also the relationship of the matter to the other elements in the mark, the nature of the goods or services, and the manner in which the mark is used in the marketplace in connection with the goods or services." Trademark Manual of Examining Procedure § 1203.03(b)(i) (Apr. 2017), p. 1200–150, http://tmep.uspto.gov. "If that meaning is found to refer to identifiable persons, institutions, beliefs or national symbols," the examiner moves to the second step, asking "whether that meaning may be disparaging to a

substantial composite of the referenced group." *Ibid.* If the examiner finds that a "substantial composite, although not necessarily a majority, of the referenced group would find the proposed mark . . . to be disparaging in the context of contemporary attitudes," a prima facie case of disparagement is made out, and the burden shifts to the applicant to prove that the trademark is not disparaging. *Ibid.* What is more, the PTO has specified that "[t]he fact that an applicant may be a member of that group or has good intentions underlying its use of a term does not obviate the fact that a substantial composite of the referenced group would find the term objectionable." *Ibid.*

In upholding the decision of the Federal Circuit, Justice Alito noted:

> *But no matter how the point is phrased, its unmistakable thrust is this: The Government has an interest in preventing speech expressing ideas that offend. And, as we have explained, that idea strikes at the heart of the First Amendment. Speech that demeans on the basis of race, ethnicity, gender, religion, age, disability, or any other similar ground is hateful; but the proudest boast of our free speech jurisprudence is that we protect the freedom to express "the thought that we hate."*
>
> The clause reaches any trademark that disparages any person, group, or institution. It applies to trademarks like the following: "Down with racists," "Down with sexists," "Down with homophobes." *It is not an anti-discrimination clause; it is a happy-talk*

> *clause. In this way, it goes much further than is necessary to serve the interest asserted.*

137 S.Ct. at 1764–1765 (citations omitted) (emphasis added). Justice Holmes echoed these same concerns in dissenting from a decision upholding the denial of a woman's petition for naturalization on the basis that she declined to take up arms in defense of the United States:

> The notion that the applicant's optimistic anticipations would make her a worse citizen is sufficiently answered by her examination which seems to me a better argument for her admission than any that I can offer. Some of her answers might excite popular prejudice, but if there is any principle of the Constitution that more imperatively calls for attachment than any other it is the principle of free thought—not free thought for those who agree with us but freedom for the thought that we hate.

United States v. Schwimmer, 279 U.S. 644, 655 (1929) (Holmes, J., dissenting).

Heightened scrutiny is required "whenever the government creates a regulation of speech because of disagreement with the message it conveys." *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 566 (2011). Heightened scrutiny is particularly required when the government seeks to restrict the use of a public forum by a private individual or group who seeks to make a statement with which the government disagrees, or which other

individuals find offensive or otherwise troubling. *Skokie, supra.*

In *Skokie*, an injunction was entered prohibiting Plaintiff from "(m)arching, walking, or parading in the uniform of the National Socialist Party of America; (m)arching, walking, or parading or otherwise displaying the swastika on or off their person; (d)istributing pamphlets or displaying any materials which incite or promote hatred against persons of Jewish faith or ancestry or hatred against persons of any faith or ancestry, race or religion" within the Village of Skokie. The Illinois Court of Appeals and the Illinois Supreme Court both denied applications for a stay and leave for an expedited appeal. Applicants then filed an application for a stay with this Court, which elected to treat the matter as a petition for a writ of certiorari. In a per curiam order, this court stated:

> If a State seeks to impose a restraint of this kind, it must provide strict procedural safeguards . . . including immediate appellate review, ... Absent such review, the State must instead allow a stay. The order of the Illinois Supreme Court constituted a denial of that right.

432 U.S. at 44.

Upon remand, the Illinois Court of Appeals ordered that the Village of Skokie allow the demonstration subject to the limitation that participants could not display the swastika intentionally on or off their persons, in the course of a demonstration, march, or

parade. *National Socialist Party of America v. Village of Skokie*, 51 Ill.App.3d 279, 366 N.E.2d 347 (1977). The Illinois Supreme Court affirmed the order directing that the parade be permitted and reversed the restriction upon displaying the swastika. In so holding, the court stated:

> The constitutional right of free expression is powerful medicine in a society as diverse and populous as ours. It is designed and intended to remove governmental restraints from the arena of public discussion, putting the decision as to what views shall be voiced largely into the hands of each of us, in the hope that use of such freedom will ultimately produce a more capable citizenry and more perfect polity and in the belief that no other approach would comport with the premise of individual dignity and choice upon which our political system rests
>
> To many, the immediate consequence of this freedom may often appear to be only verbal tumult, discord, and even offensive utterance. These are, however, within established limits, in truth necessary side effects of the broader enduring values which the process of open debate permits us to achieve. That the air may at times seem filled with verbal cacophony is, in this sense not a sign of weakness but of strength. We cannot lose sight of the fact that, in what otherwise might seem a trifling and annoying instance of individual distasteful abuse of a privilege, these fundamental societal values are truly implicated.

> *** 'so long as the means are peaceful, the communication need not meet standards of acceptability. . . .
>
> * * * * *
>
> How is one to distinguish this from any other offensive word (emblem)? Surely the State has no right to cleanse public debate to the point where it is grammatically palatable to the most squeamish among us. Yet no readily ascertainable general principle exists for stopping short of that result were we to affirm the judgment below. . . .
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> * * * * *
>
> . . . we cannot indulge the facile assumption that one can forbid particular words without also running a substantial risk of suppressing ideas in the process. Indeed, governments might soon seize upon the censorship of particular words (emblems) as a convenient guise for banning the expression of unpopular views.

Village of Skokie v. National Socialist Party of America, 69 Ill.2d 605, 613–615, 373 N.E.2d 21, 23–24 (1978).

In the present case, the intention of Petitioners to display the Confederate Battle Flag, as well as other flags of Confederate units from the Civil War, was disclosed in advance of the parade in their application. The general public, as well as those with such sensitivities, were thereby forewarned, and they were not compelled to view them. A speaker who gives prior notice of his message has not compelled a confrontation

with those who voluntarily listen or observe. As to those who happen to be in a position to be involuntarily confronted with the Confederate Battle Flag or other banners or uniforms, the following observation is appropriate: The plain, if at all times disquieting, truth is that in our pluralistic society, with constantly proliferating new and ingenious forms of expression, "we are inescapably captive audiences for many purposes." *Rowan v. Post Office Dept.*, 397 U.S. 728 736, (1970).

Much that we encounter offends our personal esthetic, if not our political and moral, sensibilities. The Constitution does not permit government to decide which types of speech are sufficiently offensive to require protection for the unwilling listener or viewer; instead, the burden falls upon the viewer to "avoid further bombardment of (his) sensibilities simply by averting (his) eyes." *Cohen v. California*, 403 U.S. 15, 21 (1971).

The fact remains that the Petitioners wish to preserve the history and perspective of the Confederate Veteran. However, Alpharetta, aided and abetted by the Eleventh Circuit, has obtained an expansion of the government speech doctrine in such a manner that the bedrock principle of a society with free and open public forums has been severely circumscribed for the parochial purpose of satisfying its decision to restrict any expression to which it objects or which some deem offensive. This position threatens to tear asunder the

entire fabric of the protections afforded by the First Amendment.

CONCLUSION

Petitioners respectfully pray that this court would issue its writ of certiorari to the United States Court of Appeals for the Eleventh Circuit so that the issues presented herein might be considered in argument.

Respectfully submitted this 27th day of December 2021.

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